

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED

April 23, 2013

In the Matter of I. H. MOORE, Minor.

No. 311923

Wayne Circuit Court

Family Division

LC No. 07-471083-NA

In the Matter of I. H. MOORE, Minor.

No. 311924

Wayne Circuit Court

Family Division

LC No. 07-471083-NA

Before: OWENS, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

In these consolidated appeals, respondent-mother, L. Neely, and respondent-father, G. Moore, each appeal as of right the circuit court orders terminating their parental rights to their minor child, I. Moore, under MCL 712A.19b(3)(c)(i), (g), and (j). We affirm.

I. FACTS

A. BACKGROUND FACTS

In April 2007, Neely gave birth to premature twins. In August 2007, Neely took one of the twins to a hospital, where he was pronounced dead. The hospital reported that his death resulted from gross negligence, malnourishment, and malnutrition. The Department of Human Services (the Department) petitioned the trial court for immediate protective custody of Neely's surviving children, including I. Moore. The petition alleged that Neely and T. Stephens, the twins' father, failed to comply with their doctors' instructions regarding the care and feeding of the premature twins, and alleged that Moore had abandoned I. Moore for more than 91 days. The Department sought immediate termination of Neely's parental rights.

After an adjudication trial, the trial court found that Neely and Stephens testified that they fed the twins regularly, and that one twin died but the other was "normal." It found that the parents failed to follow through on the twins' medical visits, and made a series of "very unfortunate errors" that resulted in the twin's death. The trial court also found that Neely and

Stephens were remorseful. The trial court found grounds to take jurisdiction over all Neely's minor children, but declined to terminate Neely's, Stephens's, or Moore's parental rights.

At the initial dispositional hearing on January 30, 2009, the trial court ordered Neely to maintain stable housing and a legal source of income, to attend therapy and parenting classes, and to undergo substance abuse treatment and drug screens. The trial court ordered Moore to maintain stable housing and a legal source of income.

B. THE TERMINATION HEARINGS

1. THE TERMINATION PETITION

On September 27, 2011, the Department filed a supplemental petition that sought to terminate Neely's and Moore's parental rights to I. Moore, as well as Neely's parental rights to her other children. The Department alleged that, while Neely completed "several of the court ordered services and . . . appear[ed] to have benefitted from some of the services, [she] continued to struggle with consistency with appointments and parenting time for [I. Moore] in particular" The Department alleged that Neely did not consistently attend services, including medical appointments and parenting time, and did not have stable and appropriate housing. The Department alleged that Moore did not comply with the trial court's orders or "follow through with establishing permanency for [I. Moore]."

2. THE FIRST TERMINATION HEARING

At the September 2011 permanency planning hearing, the trial court indicated that Moore's failure to get his paperwork to the Department reflected that he had "other priorities . . . apparently[] more important than his child." However, it found that if Moore showed commitment, he would be an appropriate parent. The trial court authorized the filing of a second petition to terminate the parental rights of Neely and Moore, and set a termination hearing date.

The initial termination hearings took place in November 2011, January 2012, and March 2012. Laidler testified that Neely did not visit I. Moore when the child was hospitalized in October 2011. Laidler testified that Neely also failed to attend the surviving twin's medical appointments, physical therapy, or visitation. David Bowbeer, I. Moore's foster care worker, testified that Neely did not verify whether she was employed, did not provide a written lease or utility bill, and that the utilities in her home were of questionable legality. Neely testified that she did not have a copy of her current lease, but that she had lived in the same residence for three years, and that the lease was in Stephens's name.

I. Moore's foster mother testified that she kept detailed documentation of the parents' visits. The foster mother testified that Neely's most recent visits included: three visits in February 2011; one visit in March 2011; one visit in April 2011; one visit in August 2011; three visits in December 2011; four visits in January 2012; and no visits in February 2012. When asked why she did not visit the child in February 2012, Neely testified that she could not answer.

The foster mother testified that Moore's most recent visits included: two visits in March 2011; two visits and one phone contact in April 2011; three visits in May 2011; three visits in June 2011; one visit in July 2011; one visit in August 2011; one visit in September 2011; two

visits in October 2011; six visits in November 2011; four visits in December 2011; six visits in January 2012; and two visits in February 2012.

Natalie Maes, I. Moore's foster care worker from October 2011 until the termination hearings, testified that Moore repeatedly failed to provide valid "criminal and [Child Protective Services] clearances" for himself and his long-term partner. Maes testified that she was unable to authorize a home study, which would result in overnight parenting times, without the clearances. Moore testified that he did not obtain the Child Protective Services clearances because the address on his state identification did not match his current address, and because on one occasion they were lost in the mail. Moore testified that he did not obtain the criminal background check because he "didn't get down there."

The trial court found that the children had been in care for over four years. The trial court found that Neely did not follow up with the surviving twin's medical appointments, which it found "concerning" because "we lost a child because there wasn't follow up with medical appointments." Commenting on different family structures, the trial court noted that it was not concerned with Neely's lack of income because Stephens was working, but opined that, therefore, Neely needed to demonstrate that she could care for the children. Concerning Neely's younger children, the trial court found that there was clear and convincing evidence to terminate Neely's and Stephens's parental rights to I. Moore's siblings, on the basis of their inability to care for and support the children.

Considering I. Moore, the trial court found that "the incident that brought [I. Moore] into the Court's supervision[] was not of Mr. Moore's making" The trial court found that Moore was visiting the child sufficiently, but that there were additional things that Moore needed to do to regain custody, including establishing that his home was suitable. The trial court delayed its decision concerning I. Moore for 30 days, to allow Moore additional time to verify his income, obtain criminal background checks for him and his long-term partner, and obtain CPS clearances, so that the Department could assess his home.

3. THE SECOND TERMINATION HEARING

At the April 2012 termination hearing, the trial court noted that Moore provided the Department with the clearances, but that the Department had not yet assessed his home. The trial court adjourned the hearing pending a home assessment.

At the May 2012 continuation, the trial court expressed its frustration that the Department assessed Moore's home only one week before the hearing, and the assessment required a follow-up. The trial court noted that it was not "blam[ing] Mr. Moore that the home study didn't get done," and ordered the Department to update its home study of Moore's residence. The trial court ordered Moore to address the specific issues—including the address on his state identification and the deficiencies in the home inspection, which in turn included acquiring I. Moore a bed—by the next hearing.

The trial court noted that, despite its previous findings, Neely's rights to I. Moore were not yet terminated; it ordered the Department to continue to provide Neely with services, including a home assessment.

At the June 2012 continuation hearing, Moore's attorney indicated that the Department did not approve two of his proposed sleeping arrangements for I. Moore. Moore's attorney indicated that Moore was uncertain about what the Department would consider an appropriate bed. The trial court indicated that it was giving Moore one more week to acquire an appropriate bed.

At the July 2012 continuation hearing, Maes testified that she spoke with Moore after the June 2012 hearing to discuss purchasing a bed. She testified that she and Moore had been unable to meet on the Monday following the hearing, and that Moore indicated he would call her with his schedule for the next Tuesday. Maes testified that Moore neither called her nor left her a message. Moore testified that he had placed a deposit on a full-size futon for I. Moore, that he still owed \$35, and would be able to pick it up in three days. Moore testified that he did not contact Maes to determine whether he had selected an appropriate bed.

Maes testified that Neely attended three parenting times with the child in July 2012. Maes testified that Neely did not provide the clearances for the home assessment.

4. THE TRIAL COURT'S RULING

The trial court found that Moore did not call Maes to arrange to purchase the bed. The trial court opined that, while it "might have seemed to be focused on these bed issues . . . this is not just about a bed. This is about following through, can somebody follow through." The trial court found that if the parents could not resolve their issues in over four years, it was uncertain how much additional time the parents would need. The trial court found that I. Moore deserved immediate permanence. The trial court found that Neely's and Moore's behavior at times showed a lack of connection to I. Moore, and they showed no urgency in regaining custody. The trial court found that clear and convincing evidence supported terminating Neely's and Moore's parental rights under MCL 712A.19b(3)(c)(i), (g), and (j).

The trial court also found that termination was in I. Moore's best interests, on the basis of the length of the case, the parents' lack of commitment, and her need for permanence.

II. DOCKET NO. 311923

In Docket No. 311923, Neely contends that the trial court did not make reasonable efforts to reunify her with the child, that its findings concerning the statutory grounds were against the great weight of the evidence, and that it failed to consider the child's placement with a "fictive kin" relative when determining her best interests.

A. STATUTORY GROUNDS

1. STANDARD OF REVIEW

This Court reviews for clear error the trial court's factual findings and ultimate determinations on the statutory grounds for termination.¹ The trial court's factual findings are clearly erroneous if the evidence supports them, but we are definitely and firmly convinced that it made a mistake.²

2. REASONABLE EFFORTS

The trial court must make reasonable efforts to reunify a parent with his or her children in every case that lacks aggravating circumstances.³ But the time for a parent to challenge a service plan is when the trial court initially adopts it.⁴

Here, the trial court found clear and convincing evidence to terminate Neely's parental rights on the basis of her lack of commitment to I. Moore. Neely does not identify what additional services could have given her more commitment or made up for her failure to visit her child. We note that Neely's arguments primarily concern I. Moore's siblings; whether the Department provided Neely with adequate bus passes to visit I. Moore's siblings or whether it adequately informed Neely of the surviving twin's medical appointments have little bearing on I. Moore, who is the subject of this appeal.

The evidence concerning I. Moore was that she was not placed with her siblings, Neely did not visit her for months at a time and could not explain why, and Neely did not visit her when she was hospitalized. Further, the Department provided Neely with extensive services. It is clear from the record that when the Department did not provide Neely with the services that the trial court believed should be offered, the trial court ordered additional services and did not hold the Department's failures against Neely. We conclude that Neely's assertions that the trial court did not make reasonable efforts to reunify her with I. Moore are not preserved and are without merit.

3. MCL 712A.19b(3)(c)(i)

MCL 712A.19b(3)(c)(i) provides that the trial court may terminate a parent's rights if there is clear and convincing evidence that

[t]he conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

Here, the trial court assumed jurisdiction over the children after finding that Neely neglected one of her twins by failing to take him to his follow-up doctor visits, and was thus

¹ MCR 3.977(K); *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010).

² *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003).

³ MCL 712A.19a(2); *In re Mason*, 486 Mich at 152.

⁴ *In re Terry*, 240 Mich App 14, 27; 610 NW2d 563 (2000).

responsible for causing his death. The trial court ultimately terminated Neely's rights to I. Moore for her lack of commitment, which we have described in detail in the preceding section. The trial court found that if Neely could not rectify these conditions after four years, she was unlikely to be able to rectify them within a reasonable time. After a review of the record, we are not convinced that the trial court's findings were erroneous. We conclude that the trial court properly found that clear and convincing evidence supported terminating Neely's parental rights under 712A.19b(3)(c)(i).

4. MCL 712A.19b(3)(g) AND (j)

MCL 712A.19b(3)(g) provides that the trial court may terminate a parent's rights if

[t]he parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

MCL 712A.19b(3)(j) provides that the trial court may terminate parental rights if

[t]here is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

A parent's failure to participate in and benefit from a service plan is evidence that the parent will not be able to provide a child with proper care and custody.⁵ Similarly, a parent's failure to comply with the terms and conditions of his or her service plan is evidence that the child will be harmed if returned to the parent's home.⁶

Here, the trial court found that Neely did participate in and benefit from important portions of her service plan. The trial court's orders included regularly visiting the child. The trial court found that Neely did not make consistent efforts to visit the child, and showed questionable commitment to the child. As reflected by the foster mother's testimony, Neely visited the child three times between March and August 2011—or the equivalent of once every two months. Nor could Neely explain her failure to visit the child in February 2012, when the termination hearing was ongoing. Finally, the trial court's finding that Neely would be unable to rectify her questionable commitment to the child within a reasonable time was not clearly erroneous, given that the trial court gave Neely over four years to demonstrate her commitment. On the basis of the record before us, we are not convinced that the trial court's findings were mistaken.

⁵ *In re JK*, 468 Mich at 214.

⁶ MCL 712A.19a(5); *In re Rood*, 483 Mich 73, 100; 763 NW2d 587 (2009) (opinion by CORRIGAN, J.).

We conclude that the trial court's findings were not clearly erroneous when it found that clear and convincing evidence of Neely's lack of commitment to I. Moore supported terminating Neely's parental rights under MCL 712A.19b(3)(c)(i), (g) and (j).

B. BEST INTERESTS OF THE CHILD

1. STANDARD OF REVIEW

This Court reviews for clear error the trial court's determination regarding the child's best interests.⁷ The trial court must order the parent's rights terminated if the Department has established a statutory ground for termination by clear and convincing evidence, and the trial court finds from evidence on the whole record that termination is in the child's best interests.⁸

2. ANALYSIS

Neely argues that the trial court erred when it failed to consider I. Moore's placement with a "fictive kin relative." We disagree.

We conclude that the trial court did not need to consider the effect of I. Moore's placement with a "fictive kin" under *In re Mason* or *In re Mays*, because those cases both address a child's placement with a *relative*. For the purposes of the statutory grounds for termination, MCL 712A.13a(1)(j) defines "relative" as

an individual who is at least 18 years of age and related to the child by blood, marriage, or adoption, as grandparent, great-grandparent, great-great-grandparent, aunt or uncle, great-aunt or great-uncle, great-great-aunt or great-great-uncle, sibling, stepsibling, nephew or niece, first cousin or first cousin once removed, and the spouse of any of the above, even after the marriage has ended by death or divorce.

The trial court's factual findings concerning the child's best interests are factually inadequate if the child is placed with a relative, but the trial court does not consider that factor when considering the child's best interests.⁹

Here, Neely has not established that caselaw required the trial court to consider I. Moore's placement with a "fictive kin" foster mother—a family friend—for the purposes of I. Moore's best interests. There is no indication in the record that the "fictive kin" foster mother was actually the child's relative under MCL 712A.13a(1)(j), and we are not persuaded that whether the foster mother knew I. Moore since birth or was "as good as a relative" to the child equates her, as a matter of law, to a relative. Thus, we conclude that the trial court's findings

⁷ MCL 712A.19b(5); *In re Trejo*, 462 Mich 341, 351; 612 NW2d 407 (2000).

⁸ *In re Trejo*, 462 Mich at 351.

⁹ *In re Mays*, 490 Mich 993, 994; 807 NW2d 304 (2012); *In re Mason*, 486 Mich at 163-164.

concerning I. Moore's best interests were not inadequate under *In re Mays* and *In re Mason* because the trial court need not consider the child's placement with a "fictive kin" foster parent under those decisions.

III. DOCKET NO. 311824

In Docket No. 311924, Moore argues that the trial court's findings supporting terminating his parental rights under MCL 712A.19b(3)(c)(i), (g), and (j) were clearly erroneous.

A. STANDARD OF REVIEW

As previously stated, we review for clear error the trial court's factual findings and ultimate determinations on the statutory grounds for termination.¹⁰ The trial court's factual findings are clearly erroneous if the evidence supports them, but we are definitely and firmly convinced that it made a mistake.¹¹

1. MCL 712A.19b(3)(g) AND (j)

MCL 712A.19b(3)(g) provides that the trial court may terminate a parent's rights if

[t]he parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

MCL 712A.19b(3)(j) provides that the trial court may terminate parental rights if

[t]here is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

A parent's failure to participate in and benefit from a service plan is evidence that the parent will not be able to provide a child with proper care and custody¹² and that the child is likely to be harmed if returned to the parent's home.¹³

Here, the trial court ordered Moore to participate in a minimal service plan—that is, the trial court ordered him to maintain employment and housing, and provide evidence of adequate employment and housing to the court. Moore did not do so. Even after Moore failed over extensive periods to provide the trial court with documentation, the trial court repeatedly gave

¹⁰ MCR 3.977(K); *In re Mason*, 486 Mich at 152.

¹¹ *In re JK*, 468 Mich at 209-210.

¹² *Id.* at 214.

¹³ MCL 712A.19a(5); *In re Rood*, 483 Mich at 100 (opinion by CORRIGAN, J.).

Moore additional time to comply with its orders. We reiterate that I. Moore was in foster care for *nearly five years*. “If a parent cannot or will not meet [his or] her minimum parental responsibilities, the needs of the child must prevail over the needs of the parent.”¹⁴ We conclude that the trial court’s findings that Moore’s questionable commitment to his child and his failure to comply with the trial court’s service plan supported statutory grounds by clear and convincing evidence were not clearly erroneous.

2. MCL 712A.19b(3)(c)(i)

MCL 712A.19b(3)(c) provides that the trial court may terminate a parent’s rights if either of the following exists:

(i) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child’s age.

(ii) Other conditions exist that cause the child to come within the court’s jurisdiction, the parent has received recommendations to rectify those conditions, the conditions have not been rectified by the parent after the parent has received notice and a hearing and has been given a reasonable opportunity to rectify the conditions, and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child’s age.

Whether the conditions that led the children to initially come into the Department’s jurisdiction continue, or whether new conditions exist, are distinct questions.¹⁵

Here, the trial court found that Moore’s conduct was not a condition that led to the adjudication involving I. Moore. However, the trial court’s error under MCL 712A.19b(3)(c)(i) may be harmless if the trial court “finds that other conditions . . . that would bring the child within the jurisdiction of the court are continuing.”¹⁶ The Department petitioned the trial court to terminate Moore’s parental rights on the basis of his failure to comply with the trial court’s orders to establish permanency for I. Moore, including appropriate housing. The trial court gave Moore ample opportunities to rectify those conditions, and he did not do so. We conclude that the trial court’s error was harmless, because the trial court could have terminated Moore’s parental rights on the basis of MCL 712A.19b(3)(c)(ii).

Further, to terminate a parent’s parental rights, the trial court need only find that the Department proved a single statutory ground by clear and convincing evidence.¹⁷ Here, the

¹⁴ *In re Terry*, 240 Mich App at 28, quoting *In re AP*, 1999 PA Super 78; 728 A2d 375, 379 (1999).

¹⁵ *In re Sours*, 459 Mich 624, 636; 593 NW2d 520 (1999).

¹⁶ See *id.* at 636-637.

¹⁷ MCL 712A.19b(3); *In re Trejo*, 462 Mich at 355.

Department proved other statutory grounds by clear and convincing evidence, and we would not reverse on the basis of the trial court's mistake under MCL 712A.19b(3)(c)(i). We conclude that the trial court did not clearly err when it determined that statutory grounds supported terminating Moore's parental rights.

We affirm.

/s/ Donald S. Owens

/s/ William C. Whitbeck

/s/ Karen M. Fort Hood